No. 87-6325

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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DONALD RAY PERRY,

*Petitioner,*

v.

WILLIAM D. LEEKE, COMMISSIONER,
South Carolina Department of Corrections, and
THE ATTORNEY GENERAL OF SOUTH CAROLINA,

*Respondents.*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

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## BRIEF FOR PETITIONER

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**Petition for Certiorari Filed January 29, 1988**
**Certiorari Granted March 28, 1988**

## QUESTION PRESENTED

Is harmless error analysis appropriate where there is a denial of assistance of counsel during the course of a criminal trial?

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### CITATION TO OPINIONS BELOW

The opinion of the South Carolina Supreme Court denying Donald Ray Perry's appeal of his conviction for Murder, Kidnapping and Criminal Sexual Conduct is reported as State v. Donald Ray Perry, 278 S.C. 490, 299 S.E.2d 324 (S.C. 1983), and is reproduced in Joint Appendix [J.A.] at pages 8 through 16. The decision of the United States District Court of South Carolina is an unpublished opinion reproduced in J.A. at pp. 17-19. The decision by the Fourth Circuit Court of Appeals, en banc, is reported as Perry v. Leeke, 832 F.2d 837, (4th Cir. 1987), and is reproduced at J.A. pp. 20-52.

### JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent part:

> [I]n all criminal prosecutions, the accused shall enjoy the right,..to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE

During the course of Petitioner's criminal trial and after his direct testimony, the trial court, sua sponte, ordered that Petitioner not be allowed to consult with his attorney during a fifteen minute court-ordered recess. This ruling was subsequently addressed by the South Carolina Supreme Court which found that the judicial order barring Petitioner from his



counsel was not inconsistent with this Court's determination in Geders v. United States, 425 U.S. 80 (1976), and that the ruling of the Fourth Circuit Court of Appeals in United States v. Allen, 542 F.2d 630 (4th Cir 1976), was not "binding on the Supreme Court of South Carolina." J.A. p. 12.

Petitioner sought habeas relief in the United States District Court for South Carolina which was granted in an Order issued on June 26, 1986. Upon appeal of this Order by the State of South Carolina, the Fourth Circuit, en banc, reversed the District Court and issued an opinion finding the Sixth Amendment violation to be harmless error under the principles of Strickland v. Washington, 466 U.S. 668 (1984).

### A. How the Deprivation of Counsel Occurred at Trial

Petitioner was tried for the

offenses of Murder, Kidnapping and Criminal Sexual Conduct in the First Degree. These charges stemmed from the death of Dr. Mary Heimberger, a University of South Carolina professor, in March of 1981. Subsequent to his arrest, the Petitioner was committed to the South Carolina State Mental Hospital where he was found incompetent to stand trial due to a mental condition known as hysterical reaction. After a three month commitment in the hospital, the Petitioner was returned to the custody of the Sheriff of Richland County.

On September 21, 1981, trial began in which the State of South Carolina sought the death penalty. The State rested its case on September 29, 1981, in the mid-morning. The Petitioner presented two short witnesses prior to taking the stand in his own defense. Petitioner's trial counsel informed the trial court that his testimony would be lengthy and the trial



court recessed for lunch. (Tr. p. 663). Following the luncheon recess, the Petitioner took the stand for a lengthy examination concerning his background and his actions in this case. At one point during direct examination, a juror indicated a desire for a break and the court recessed for five minutes to allow the juror to leave the courtroom. (Tr. p. 705).

At the conclusion of the Petitioner's testimony, the trial court ordered a fifteen minute recess. (J.A. p. 3, Tr. p. 771). Unbeknownst to Petitioner or counsel, the trial court ordered that Petitioner not be allowed to consult with anyone during the break, including his counsel. Upon attempting to consult with the Petitioner during the break, counsel was informed of the order and, at the conclusion of the recess, moved for a mistrial based upon violation of Petitioner's Sixth Amendment right to

counsel. The trial court denied this motion indicating that "he was in a sense then a ward of the court. He was not entitled to be cured or assisted or helped approaching his cross examination. I felt in fairness to the State that was proper and I accept full responsibility for it. Your motion is denied." (J.A. p. 5, Tr. p. 773). Subsequently, the trial court acknowledged that Petitioner's counsel would not have improperly advised his client during the break but Petitioner's subsequent motion for mistrial was also denied. (J.A. p. 4, Tr. p. 961).

## B. The Allegations Against Petitioner and Defense Presented

The Petitioner was arrested based upon physical evidence found at the scene of Dr. Heimberger's murder. At that time, he professed no knowledge as to the



homicide but admitted that he had been stuck in his mother-in-law's car at the scene late in the evening of Dr. Heimberger's abduction. Shortly after his arrest, Petitioner was interrogated on three occasions prior to the appointment of counsel. During the third interrogation and after being informed that his wife was being interrogated in another room, Petitioner gave a statement indicating that he had accidentally shot Dr. Heimberger but that no sexual contact had occurred. The interrogating officers later testified that the "confession" given by Petitioner was wholly inconsistent with the facts of the case. (Tr. p. 617, ll. 11-16; p. 622, ll. 9-16). These officers also admitted that during the interrogation they tried to convince the Petitioner that he was involved in the homicide (Tr. p. 621, ll. 14-19); and that Petitioner could hear his wife crying loudly in another office where

she was being questioned. (Tr. p. 623, ll. 3-22).

Shortly after the oral statement, the Petitioner was committed to the South Carolina State Mental Hospital where he was diagnosed as suffering from a hysterical reaction and amnesia. (Tr. p. 1091, ll. 4-10). Testing at the hospital indicated that the Petitioner was functioning at a mildly retarded level (Tr. p. 1087, l. 20); was very dependent upon his wife in a childlike manner (Tr. p. 1088, ll. 6-7); and was a passive, nonviolent individual who was easily influenced. (Tr. p. 1089, ll. 2-3). The Petitioner had no memory of the events leading up to his arrest and was suffering from an extreme stuttering and seizure problem for the first time in his life. (Tr. p. 1092, ll. 4-15).

Petitioner's memory was restored through psychiatric medications and the use of sodium amytal (Tr. p. 1100, ll. 9-25).



During the sodium amytal interview some four months after his arrest, the Petitioner was able to recall the events of the evening of the homicide. In reliving the episode he portrayed "the fear, the fright, the tears, crying and whatnot as [he] talked about different parts of the events of that evening." (Tr. p. 1103, ll. 2-3). It was learned during the interview that Mr. Perry had been an unwilling participant in the abduction, rape and murder of Dr. Heimberger. Another individual, Larry Deloach, whose nickname was "Duke-Dog," had forceably abducted Dr. Heimberger while in the Petitioner's company. Following the abduction of Dr. Heimberger, Petitioner testified that "Duke-Dog got out of the car and he told me, say, nigger, you better follow me and you better do what I say do or else I'm gonna take you out." (Tr. p. 751, ll. 4-6). When questioned why he did not drive

off at this point, Petitioner indicated that he was scared and followed the instructions given to him by Deloach. (Tr. p. 752, ll. 11-17). At the scene, the Petitioner testified that he attempted to protect Dr. Heimberger from Deloach but he was unsuccessful. He was forced at gunpoint to have sexual intercourse with the victim. Mr. Perry attempted to rescue Dr. Heimberger by jumping Deloach but when this was attempted, Deloach threw him off and shot the fleeing victim three times. (Tr. pp. 757-766).

Various witnesses were presented by Petitioner to corroborate his version of what occurred. Petitioner testified that while in the State Mental Hospital he was visited by Deloach and that Deloach threatened his family if Mr. Perry mentioned Deloach's name. (Tr. p. 721, ll. 6-18). The fact of Deloach's visit was corroborated by a staff member of the



hospital who also corroborated that Petitioner was upset by Deloach's visit. (Tr. p. 847, ll. 8-9; p. 849, ll. 1-5; p. 853, ll. 11-15). Three additional witnesses testified that immediately prior to the abduction of Dr. Heimberger they saw the Petitioner in the company of Deloach. (Clisby Calhoun, Tr. p. 823; Thelma Wallace, pp. 828, 836-837; Alexander Middleton, pp. 842-843).

Independent testimony was also presented that Dr. Heimberger's automobile was returned to her apartment complex at 11:15 p.m. on the night of the homicide. (Tr. p. 656). Petitioner's mother and sister testified that Petitioner arrived at their home on foot shortly after 11:30 p.m.. (Tr. pp. 856 and 869). Petitioner's automobile was stuck at the scene of the crime and evidence at the scene indicated he had spent considerable time attempting to move his vehicle before walking to his

mother's residence. (Tr. p. 261, ll. 2-7; p. 324, ll. 11 - p. 327). The distance from the scene to Petitioner's home was almost a mile and the distance from Dr. Heimberger's residence to the crime scene was 9.9 miles. (Tr. p. 1019, ll. 1-6). The time and distance testimony was presented to demonstrate the unlikelihood that only one person was involved in the homicide.

Physical evidence from the scene indicated the presence of another person. A hair, appearing to be of Black origin, found in the victim's auto and used as probable cause for the Petitioner's arrest was determined by the F.B.I. not to have been from the Petitioner. (Tr. p. 640, ll. 13-15). As both the Petitioner and Deloach were nonsecretors of the ABO blood factors, the semenal stains found in the victim's auto and on her person could have come from either man. (Tr. p. 630 - 631).



The Petitioner's defense was that of common law duress and that he took no active part in the abduction and homicide of Dr. Heimberger. The weakness in this defense was the failure of the Petitioner to flee during the initial abduction. Expert psychiatric testimony was presented concerning Mr. Perry's inability to resist Deloach's threats (Tr. pp. 1105-1108), but the trial court refused Petitioner's request to instruct the jury to consider Petitioner's mental condition in determining whether Petitioner had a reasonable opportunity to escape. (Tr. pp. 1183 - 1191, 1195).

The trial jury deliberated for six hours and forty-five minutes before requesting that the trial judge reinstruct the issue of duress. (Tr. p. 1331). Following this instruction, the jury deliberated another five and one half hours before finding Petitioner guilty of all

charges. The jury subsequently returned a unanimous verdict of life imprisonment.

## SUMMARY OF ARGUMENT

The majority opinion of the Circuit Court found that the Petitioner had been denied the right to counsel by the trial court's order but found under the principles set forth by this Court in Strickland v. Washington, 466 U.S. 668 (1984), that "any error at the State trial did not prejudice Perry." (J.A. p. 21; 832 F.2d 838). While Strickland establishes a standard for determination of prejudice caused by ineffectiveness of counsel, it is an inappropriate standard for application to denial of counsel situations.

The greater standard of prejudice established in Chapman v. California, 386 U.S. 18 (1967), is also inappropriate as Chapman and a series of cases since its



issuance consistently hold that denial of counsel is inappropriate for harmless error analysis.

Application of harmless error during criminal trials has traditionally been applied to situations involving erroneous admission of evidence or improper argument. Courts have determined the effect of such impropriety by considering the effect the evidence or argument had or would have had upon the trier of fact. Errors which go to the very heart of the system are traditionally not subjected to harmless error as they are fundamentally unfair and the effect of such errors is often not easily determined.

Due to the indeterminable nature of the harm caused by errors of this type, applying the rule of Strickland or Chapman would create a constitutional deprivation for which there is no remedy. As efforts to establish prejudice by a criminal

defendant would also involve interference with the attorney/client privilege, Bailey v. Redmond, 657 F.2d 21, 24 (3rd Cir. 1981) cert. denied, 454 U.S. 1153 (1982); Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir., 1986), degradation of the criminal justice system would result.

## ARGUMENT

## APPLICATION OF THE STRICKLAND V. WASHINGTON PREJUDICE TEST TO DENIAL OF COUNSEL AT TRIAL IS FUNDAMENTALLY UNFAIR.

### A. There Is No Rational Basis For Differentiating Between The Effect Of Denial Of Counsel In An Overnight Recess And A Routine Trial Day Recess.

The analysis used by the Circuit Court in determining harmlessness would be equally applicable to any case regardless of the length of denial. While recognizing



that overnight restriction would be presumed to be prejudicial under Geders v. United States, 425 U.S. 80 (1976), the opinion below found no prejudice in this case by considering factors such as the quality of Petitioner's representation; whether Petitioner received a "fair trial" in all other areas; Petitioner's performance upon cross-examination; the nature of the evidence against the Petitioner; the existence of other recesses in which Petitioner could consult; and the absence of other "colorable assignment of error." Such factors would be applicable to any situation in which there was denial of counsel regardless of duration. The duration of the recess is the only distinction between this case and the situation in Geders.

The distinctions drawn are artificial. Here, as in Geders, the recess was between direct and cross-examination.

The denial was as complete and without prior notice. The potential for prejudice in both instances is identical as the quality of the deprivation is not determined by its length. The inability to communicate is at issue, not whether it is overnight or for fifteen minutes. As pointed out by Chief Judge Winter in dissent, an overnight recess may "entail an effective deprivation of little more than the fifteen minutes at stake here...." (J.A. p. 43); 832 F.2d 837, 849 (1988).

The length of the recess has little or nothing to do with the issue of prejudice. The issue is whether the criminal defendant would have consulted with counsel. If he or she would have, then there is presumed prejudice requiring reversal.

**B. The Use Of The Strickland v. Washington Outcome Determinative Test For Prejudice Places An Insurmountable Burden Upon The Criminal Defendant.**

Applying the Strickland v. Washington test for prejudice would require the criminal defendant to establish that the constitutional error undermines "reliance on the outcome" of the trial. This outcome-determinative test would in effect create a presumption of harmlessness as few criminal defendants can demonstrate what might have been discussed had consultations been allowed or how such discussions would have affected the outcome. The benefit of the "guiding hand" aspect of counsel is even more nebulus.

Former Justice Harlan, dissenting in Chapman v. California, 386 U.S. 18 (1967), found that there are some constitutional errors which traditionally are not subject to harmless error and which

"seem to me essential to the fundamental fairness guaranteed by the due process clause..." Chapman at 52, n. 7. He found this principle to be well established by precedent of this Court and stated:

> The first is a recognition that particular types of error have an effect which is sc devastating or inherently indeterminate that as a matter law they cannot be found to be harmless... I would see violations of Gideon v. Wainwright, 372 U.S. 510, as falling in the first category.... Id.

The order of the trial judge, isolating the Petitioner from counsel, is by its nature "inherently indeterminate." The analysis below centered upon what occurred during the trial and not what effect consultation may have had. This is occasioned by the inability of a court to determine the effect of something which did not occur. Error in denial of counsel is



inappropriate for harmless error analysis for this very reason. See, Rose v. Clark, 106 S.Ct. 3101, 3107, n. 7 (1986).

**C. This Court Has Traditionally Recognized That Denial Of Counsel Should Not Be Subjected To Harmless Error Analysis.**

"The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States 315 U.S. 60, 76 (1942). The correctness of this proposition was endorsed in Chapman v. California, 386 U.S. 18 (1967), which recognized that there are "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. Chapman identified three traditional areas where there was no prejudice inquiry:

coerced confessions, right to counsel, and impartial tribunal. Other errors of constitutional dimension may be subject to the "reasonable possibility that the evidence complained of might have contributed to the conviction" standard. Chapman at 24. The opinion below, by applying the Strickland standard, imposed upon the Petitioner a burden even greater than that espoused in Chapman.

Since this Court's decision in Chapman, there has been continued recognition that the denial of counsel at trial is one of several errors "so fundamental and persuasive that they require reversal without regard to the facts and circumstances of a particular case." Delaware v. Van Arsdale, 106 S.Ct. 1431, 1437 (1986); see also, Strickland v. Washington, 466 U.S. at 692; U.S. v. Cronic, 466 U.S. 648, 659 n. 25 (1986); Rose v. Clark, 106 S.Ct. 3101, 3106 n. 6



(1986); United States v. Hastings, 461 U.S. 499, 508, n. 6 (1982). There has been consistent recognition of the per se nature of such violations as they involve principles fundamental to our legal system. As the right to counsel at trial is in this category the duration of a deprivation of the right does not change the nature of the error. Any conviction obtained in violation of this principle is tainted.

**D. Requiring A Criminal Defendant To Demonstrate Prejudice Will Necessarily Interfere With The Attorney Client Relationship.**

The majority opinion below acknowledged there is a potential for interference with the attorney/client relationship by requiring a showing of prejudice. The opinion offered no solution to this problem as the majority found "the clear absence of prejudice has obviated the

need for any inquiry into that relationship." (J.A. p. 34); 832 F.2d 837, 844, n. 3. Further, the opinion asserts that a similar dilemma is posed by the prejudice inquiry of Strickland and Cronic. Id..

Ineffective assistance of counsel claims necessarily require inquiry into attorney/client discussions and the criminal defendant, by challenging the conduct of his counsel, waives the privilege for the purposes of the allegations. The Court in Strickland addressed the dangers of intrusive, post-trial inquiry in the context of a "second trial, this one of counsel's unsuccessful defense." 466 U.S. at 690.

The inquiry in this case is of a wholly different nature. There is no asserted deficiency on the part of counsel, the error is that of the trial court. It is clear there is no waiver of attorney/client privilege yet "private



discussions between counsel and client could be exposed in order to let the Government show that the accused's Sixth Amendment rights were not violated" Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir. 1986), see also, Bailey v. Redmond, 657 F.2d 21, 24 (3rd Cir. 1981). The adoption of a prejudice inquiry rule in this context would in most cases allow intrusion into the sanctity of attorney/client privilege. Such intrusion would occur even though neither the criminal defendant nor his counsel had invited or caused the error.

This Court has never advocated that a criminal defendant must forego one fundamental right in order to be accorded the guarantees of our constitution. The summary fashion in which this issue was resolved below does injustice to both this Petitioner and the sanctity of the principle.

Another serious problem of delving into private discussions between counsel and defendant to determine prejudice would be the potential that it would involve disclosure of trial strategies. Certainly, this would be critical if the deprivation is found to be prejudicial and a retrial is required. Much of the communication between a criminal defense attorney and his client is of a sensitive nature dealing with the defenses to be presented. The disclosure of such communications would not only inhibit the close communication necessary in this relationship but would leave the spectrum of disclosure of such communications open to use by the Government in subsequent trials.

**E. Reliance On The Evidence Against Petitioner And Petitioner's Performance On Cross-Examination To Support The Decision Of The Court Below Demonstrates The Danger Of Applying Harmless Error Analysis.**

There was substantial evidence presented to the trial jury that Petitioner was an unwilling participant in the murder of Dr. Heimberger. (supra pp. 6 - 13). This evidence came both from Petitioner's testimony and from independent scientific, circumstantial, and eyewitness testimony. The Petitioner's trial testimony was substantially similar to that which was first disclosed while under the influence of sodium amytal, (Tr. pp. 1013 - 1014), and there was expert testimony presented that at the time of the Petitioner's "confession" he was suffering from amnesia.

The determination that "the evidence against Perry was overwhelming" (J.A. p. 32), 832 F.2d at 843, is simply

unsupported by the evidence in this case.

The finding that Petitioner "took full advantage of his rights on cross-examination..." (J.A. p. 31), 832 F.2d at 843, is apparently based upon the majority's opinion that "Perry was anything but a passive witness on cross-examination." (J.A. p. 31), 832 F.2d at 843 n. 2. The argumentative nature of many of Petitioner's responses would support this finding. Being argumentative or nonresponsive to prosecution questions, however, does not comply with commonly accepted rules for testimony by a criminal defendant.

During his cross-examination, the Petitioner failed to respond at all to the fifth question asked by the prosecutor, (Tr. p. 774, ll. 17-18), and his failure to properly respond to other questions caused the trial judge to admonish him before the trial jury. (Tr. p. 784, ll. 17-25). The



commonly accepted instruction given by counsel to a testifying defendant is to answer the question asked and then, if necessary, explain. The defendant should never argue with the prosecutor.

Mr. Perry's low mental capabilities and fragile emotional state required the "guiding hand" of counsel at this critical point. Petitioner's defense hinged upon his ability to convince the jury of the truthfulness of his testimony and his inability to resist the threats of Deloach. The extended, direct examination necessitated a reminder as to the principles of cross-examination as well as reassurance to the Petitioner prior to being subjected to the prosecutor's attack. Being confined during this critical break without contact with any ally would have tended to increase Mr. Perry's anxiety and further reduce his abilities to effectively deal with cross-examination.

A criminal defendant's performance and demeanor while under cross-examination demonstrates for the trial jury the nature of his character and issues of credibility and guilt are often determined intuitively during this process. The ability to deal with cross-examination in a manner consistent with the defense likewise may be subtle in nature but upon such subtleties guilt or innocence is often determined.

The Circuit Court's conclusory determination of harmlessness ignores the substantial factual issues presented in this case and demonstrates the heavy burden that would be placed upon a criminal defendant to successfully prove prejudice. The Circuit Court recognizes the significance of an error of constitutional dimension but fails to provide a proper remedy for which the wrong may be redressed.



**F. Fundamental Fairness Has A Broader Meaning Than Just The Reliability Of A Verdict.**

This Court has long recognized that while the reliability or correctness of a verdict in a criminal case is of importance, the concept of "fundamental fairness" is larger in scope. There are certain basic tenets of justice which apply not only to fairness in an individual case but also to the totality of our criminal justice system.

Fundamental fairness lies at the heart of the Due Process Clause of the Fifth and Fourteenth Amendments. It involves "those fundamental notions of fairness and justice in the determination of guilt or innocence which lie imbedded in the feelings of the American people...." Haley v. Ohio, 332 U.S. 596, 607 (1948) (Frankfurter, Justice, concurring). To

adopt an outcome determinative test for this concept would tend to debase the principle sought to be protected.

> As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Lisenba v. California, 314 U.S. 219, 236 (1941).

It was found in Lisenba that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Id..

Justice Roberts, the author of Lisenba, earlier made it clear that an outcome determinative test for due process violations was improper.



> [W]here the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, though the result is just, if the hearing was unfair. Snyder v. Massachusetts, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting).

While outcome-determinative factors are important in many analyses of harmless error, they should remain as only one area of inquiry and not be solely determinative. There are certain errors so basic to our concept of justice that the use of outcome-determinative tests assaults the inherent fairness embodied in the system. Denial of counsel during trial is recognized as such error. The opinion below, however, relegates this fundamental

right to that of an "imperfection" which often occurs during trial. (J.A. p. 34); 832 F.2d at 845. To so denigrate this principle "which lies at the foundation of our system of criminal justice" threatens the American concept of justice. (App. p. 46, 832 F.2d at 850).

## CONCLUSION

For the foregoing reasons, the Petitioner submits that the judgment of the Court of Appeals for the Fourth Judicial Circuit should be reversed and Petitioner's Writ of Habeas Corpus granted.

RESPECTFULLY SUBMITTED, this the 12th day of May, 1988, in Columbia, South Carolina.

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